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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. 560.

LEE OLIPHANT, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondents disagree with the petitioners' statement of the questions presented by the complaint and the evidence of record in this case.

The first question stated by the petitioners is concerned with whether a provision in the constitution of the Brotherhood of Locomotive Firemen and Enginemen which excludes various classes of persons, including Negroes, from membership in the Brotherhood, denies to petitioners a right given them by the Railway Labor Act, to wit, the right to "fair and equal representation." This question suggests that the answer to the petitioners' contention can be arrived at by *interpreting* the Railway Labor Act.

The language of the Railway Labor Act provides no answer to the petitioners' contention. The Act contains not the remotest reference to the subject of *membership* in labor organizations. This Court so recognized in its de-

cision in *Steele v. L. & N. R. R. Co.*, 323 U. S. 192, at 204. An answer to this question will be found in the Railway Labor Act only if the power to legislate is substituted for the process of interpretation.

The second question posed by the petition is whether a labor organization designated to represent a craft of employees for the purposes of the Railway Labor Act becomes an agency of the Federal Government and its actions as craft representative thereby become subject to the Due Process Clause of the Fifth Amendment. The respondents believe this proposition is too gossamer to invite serious consideration by any court.

The collective agreements that are negotiated by a railway brotherhood establish the terms of employment for employees within a craft, including those employees who are not members of the brotherhood, in exactly the same manner today as they did during the decades prior to the enactment of the Railway Labor Act. The Negro firemen and other firemen who are white but who have not been members of the respondent Brotherhood have never negotiated their own terms of employment with the southeastern carriers. They have always rendered their services subject to the terms established by the collective agreements negotiated by the Brotherhood. The reason why this is true is a matter of common knowledge in the railway industry.

The carriers bargained in the past with the railway brotherhoods only when, and because, the brotherhoods possessed the loyalty and support of at least a majority of the employees within the craft. Furthermore, two scales of pay or two standards of employment cannot, as a practical proposition, exist side by side within one craft.

The Railway Labor Act has had no more than a metaphysical influence on this situation. The Act, as in-

terpreted by this Court in *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342, and related decisions, merely forbids an individual employee or a minority group within a craft from doing something which they never had the power or the desire to do previously.

It is completely unrealistic to say that, because the Congress has made the collective bargaining agreement dominant over the terms of employment negotiated by individual employees with their employer, the effect of this exercise of the legislative power is to make the union selected to represent the craft an agency or arm of the Federal Government.

The respondents believe that the question posed by the complaint and the evidence of record in this case was correctly stated by the Court of Appeals, as follows:

> "The question presented on the record before us is whether or not the Congress transcended the constitutionally protected rights of individual employees when it stripped them of their bargaining privileges as individuals and conferred that function upon a majority elected representative, over which the individual has no direct control and in which he is not eligible for membership."

STATEMENT

The petitioners' statement of the circumstances that gave rise to the questions of law which this Court is asked to rule upon, omits certain facts and circumstances which the respondents believe will have a bearing upon the Court's decision to grant or deny the petition for certiorari. The facts and the circumstances referred to are the following:

For all that the petition discloses, the provision in the Brotherhood's constitution which excludes Negroes from

membership may be a recently adopted restriction. The truth is that this restriction on membership has been a law of the Brotherhood since the inception of the organization more than 75 years ago. (R. 206a.) This restriction on membership was perfectly valid when adopted. It was a valid restriction when the original Railway Labor Act was enacted on May 20, 1926. And, insofar as counsel for respondents are aware, it was a valid restriction when the Railway Labor Act was amended substantially on June 21, 1934.

A second circumstance is that the petitioners' statement permits the assumption that the constitutional restriction on membership in the Brotherhood excludes only Negroes, and, hence, the question before the Court poses merely a problem of racial discrimination. The fact is that the constitutional provision imposes a variety of restrictions on membership in the Brotherhood. This provision reads as follows:

> "(a) An applicant for membership must be actually employed as a locomotive fireman, engineman, engine hostler, hostler helper, engine dispatcher, employed handling engines in or about round house or ash pit, in shop yards, locomotive works or industrial plants, motorman or helper on electric engines, motor or gas cars on roads where electric energy is used or has been substituted for steam, or holding seniority rights as such, at the time he makes his application; provided, he shall not be a member of any other labor organization assuming to represent engineers, firemen, hostlers or hostler helpers, except the Brotherhood of Locomotive Engineers, nor shall he be a member of any organization of employees which at any time, in any manner, endeavors to interfere with the policy or action of this Brotherhood. Engine hostlers or engine dispatchers are persons who actually handle and are responsible for the care

of locomotives. Foremen who act as hostlers and receive hostlers' pay shall be eligible to membership. Hostler helpers are persons who are assigned and required to assist hostlers. Traveling engineers, traveling firemen and motormen employed on street railways are not eligible to membership.

"(b) He shall be white born, of good moral character, sober and industrious, not less than sixteen (16) years of age, and be able to read and write the English language and understand our constitution. Mexicans, or those of Spanish-Mexican extraction, are not eligible. Should the provisions of this paragraph or any portion thereof, be in violation of or in conflict with the laws of the United States, Canada or of any state or province, as contained in statutes or court decision, then in that event the provisions of such law shall supersede the provisions of this paragraph to the extent required to bring about conformation to such law and to remove the violation or conflict." (R. 34a-35a.)

While, admittedly, the plaintiffs in this action are all Negroes, and they have, for the time being, restricted their challenge to that part of the constitutional provision which requires applicants for membership to be "white born," yet the legal basis that allegedly exists for challenging the validity of this restriction as applied to Negroes, applies with equal force to the many other restrictions on membership contained in the constitutional provision quoted above.

The petitioners' thesis is that a labor union which functions as a craft representative is required by some law of the land to open the doors of membership to all persons within the craft in order that all may participate equally in the so-called process of formulating collective bargaining objectives. (Petition, pp. 9-14.) If the op-

portunity for equal participation in collective bargaining councils by all employees within the craft, through membership in the organization representing the craft, is in truth a requirement of the law, then surely the conclusion that must be drawn is that this law proscribes any attempt by the craft representative to insist upon a selective membership.

The third circumstance that should be weighed by the Court is the fact that the Brotherhood is more than a labor organization. The Brotherhood has been a fraternal benefit society since its inception, conducting a large insurance and social program for its members.

The Brotherhood has an auxiliary organization known as the Ladies' Society of the Brotherhood of Locomotive Firemen and Enginemen. The members of the Ladies' Society are the wives, mothers and sisters of the Brotherhood members. The Society has a total membership of between 44 and 45 thousand. Its activities are largely social. Its members conduct joint social meetings with lodges of the Brotherhood (R. 170).

Fourth, the petitioners launched this action on the stated premise that the Brotherhood has continuously used its position since November, 1951, as representative of the firemen's craft to oppress the Negro firemen because of their race or color, by depriving them of their employment rights.[1] The significance of the November, 1951, date is that it marked the end of a series of suits, of which the *Steele* case was the vanguard, which challenged the validity of the Southeastern Carriers' Conference

[1] The appellants explain that they seek in this action the unique remedy of a court order requiring the Brotherhood to take them into membership because the remedy provided by the doctrine announced in the *Steele* case is too cumbersome and slow (R. 298-301).

Agreement of February 18, 1941, and also attacked the Brotherhood's collective bargaining proposal to the southeastern carriers that Negro firemen be promoted to engineers in the order of their seniority in the same way that white firemen are promoted to engineers. In the agreements that settled this litigation, the Brotherhood and the southeastern carriers agreed that permanent injunctions should be issued forbidding them to discriminate, on the basis of race or color, against the Negro firemen, and also, that the Negro firemen would not be required to take their turn for promotion to engineer (R. 325a and 328a). The injunctions protecting the Negro firemen against being promoted to engineers is qualified to the extent that it applies only to the Negro firemen in employment when the settlement agreements were signed. The Negro organizations agreed that with respect to Negroes newly employed after November, 1951, the Brotherhood would have the right to use any power necessary to persuade the carriers to apply alike to all firemen, regardless of race, the rules governing promotion to engineer (R. 325a, para. 3; R. 330a, para. 3).

During the trial of the instant case the petitioners contended that the alleged continuing racial discrimination practiced against them by the Brotherhood and the carriers and affecting their employment rights has taken four forms. These are:

(1) The minimum mileage regulation rules have been reduced by agreement between the Brotherhood and the carriers, and this reduction has the effect of reducing the monthly income of the Negroes;

(2) A so-called "gouge" rule is applied to the Negro firemen in an unlawful manner, so as to reduce their earnings;

(3) The mileage regulation rules are applied to Negro firemen and not to "demoted" engineers; and,

(4) The Brotherhood and the carriers have entered into agreements establishing a compulsory retirement rule for firemen at age 70.

The District Court found against the petitioners' contention that they are the victims of racial discrimination.

The Court of Appeals for the Sixth Circuit took an extraordinary length of time to review this case and it affirmed the District Court's findings in the following forceful language:

> "In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants. He stated the position of the Negro firemen to be that the 'Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the "gouge" rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70.' The Judge continues: '* * * these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes.' 156 F. Supp. 89, 90.

"A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the District Court are eminently correct and are supported by substantial evidence." [2] (Emphasis ours.)

This Court has repeated many times the rule it follows when issues of fact have been resolved by the concurrent findings of a district court and a court of appeals. In *Page v. Rogers*, 211 U. S. 575 at 577, this Court stated:

"* * * counsel urged with great earnestness that the findings of fact in the two courts below were erroneous, and we were invited to consider the evidence again in that view. But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown."

More recently, in *Allen v. Trust Co. of Ga.*, 326 U. S. 630, at 636, this Court stated:

"Those findings, being concurrent findings of the two lower courts, will be accepted here without re-examination of the evidence."

The ugly charge of racial discrimination indulged in by petitioners has thus been established by the District Court and the Court of Appeals to have no basis in fact. Hence, the issue of racial discrimination is not, we would suppose, a part of the case before this Court.

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[2] Among the petitioners in the instant suit, those employed on the Central of Georgia Railway, being represented by the same counsel that represent petitioners in the instant suit, instituted a contempt proceeding on December 18, 1957, against the Brotherhood and the Central of Georgia Railway before the United States District Court for the Middle District of Georgia. The proceeding charged the Brotherhood and the carrier with the first, third, and fourth types of discriminatory practices charged in the instant suit. A trial was had and the District Court's findings, in the form of an opinion, are reproduced in the Appendix to this brief for the convenience of this Court.

ARGUMENT

We wish to make plain, at the risk of being repetitious, what this case does *not* involve. It does not involve a question regarding the validity or applicability of any collective bargaining agreements allegedly made on a racially discriminatory basis. Petitioners have sought from the initiation of these proceedings in the District Court to the present time to make this case appear as one predicated upon racial discrimination in representation in order to evoke the sympathy and restraint prompted by such issues.

But both courts below found all the facts pertaining to such contentions against petitioners. The opinion below makes this abundantly clear:

> "Although these proceedings have been punctuated by accusations of racial discrimination, it would seem that we are really concerned only with ascertaining the rights of any person who, for any reason, finds himself in a minority or outvoted status, the issue of actual discrimination by the Brotherhood having been subtracted from the issue by the findings of the district judge, as hereinbefore stated." (App. to Pet. for Cert., p. 28.)

The issue is thus reduced to the narrow, technical question of whether, when a collective bargaining representative, duly designated and authorized to represent employees under the Railway Labor Act, is an unincorporated association, such association must admit to membership all employees in the craft it represents, and may not exclude an employee from membership because of his race.

1. There is no requirement in the statutory or common law imposing such condition or prohibition on an unincorporated association. Clearly, there is no provision of the Federal Constitution that imposes any such requirement or prohibition on respondent. The first ten amend-

ments are directed to governmental action, not to that of unincorporated associations. *Corrigan v. Buckley*, 271 U. S. 323.

Petitioners attempt to raise a Fifth Amendment question in rather vague language, in which they refer to "equal representation which the Constitution guarantees to all persons regardless of race" (Pet., 9-10), "rights without which the bargained conditions of employment are constitutionally tainted" (Pet., 13), and "the possibility of election to officership" which they say "is in itself a right not to be lightly discounted." (Pet., 14.)

There is no question in this case of petitioners being denied an equal voice in the determination of who shall be the collective bargaining representative. The Railway Labor Act gives them that right. But they want to go further. The Brotherhood being the choice of the majority, they want an equal voice in the election of Brotherhood officials and they want to participate in the alleged collective bargaining councils of the Brotherhood. (Pet., 8-10.)

Petitioners' "thumb on the scales" argument (Pet., 17-21) far overshoots the mark. They would convert the Brotherhood into an agency or department of the Federal Government, by reason of its having been selected as collective bargaining representative, bound by all of the requirements and limitations imposed by the Constitution on the Federal Government. That such is not the situation is perhaps best illustrated by the proposition that while, almost certainly, Congress could not constitutionally establish rates of pay for locomotive firemen, there is no question but that the Brotherhood and the railroads can lawfully establish, by agreement, the firemen's pay scale, as they have done. And if the "thumb on the scales" has the consequences suggested by petitioners, then it would

seem that every business man, farmer, and veteran who receives help from the government would also be required by the Constitution to operate his business, farm, and home without racial discrimination and subject to all the other restrictions imposed on the Federal Government. Most of such results may be socially desirable to some part of society, but it cannot seriously be thought that they are constitutionally required.

Nor is there any statutory requirement that the Brotherhood admit petitioners to membership. This argument of petitioners (Pet., 15-16) is simply a play on words. They say they are denied the right to vote for Brotherhood officials, while the Railway Labor Act gives a craft the right to bargain "through representatives of their own choosing," and the actual negotiations are conducted by officials. Assuming that to be true, there can be no question that the "representative" in the statutory sense is the Brotherhood, not any particular official at any level. Petitioners have always been entitled to full and equal rights in determining who the bargaining representative in the statutory sense shall be.

The Act defines "representative" as "any person or persons, labor union, organization, or corporation designated * * *" 45 U. S. C. Sec. 151, Sixth. Petitioners' statutory argument would give them the right, in the event a corporation were designated, to vote for officers and directors of the corporation.

This Court has expressly recognized that there is no limitation in the Railway Labor Act on the right of a collective bargaining representative to restrict its membership on any basis. In *Steele v. L. & N. R. Co.*, 323 U. S. 192, at 204, the Court said:

> "While the statute does not deny to such a bargaining labor organization the right to determine

eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith."

And that conclusion of this Court has been confirmed by Congress. In 1950, when the union-shop amendment to the Railway Labor Act was under consideration by the Senate, an amendment was introduced which would have prohibited organizations having racial restrictions on membership from acting as collective bargaining representatives. The amendment failed of enactment.[3]

2. The final argument of petitioners for the granting of the writ—that it should be granted as a vehicle for reversing the decisions below, not because they are wrong or because respondent is acting unlawfully but because it would promote racial integration in the public schools and other public facilities—is not an appeal to legal principles.

3. The concurring decisions and opinions of the District Court and Court of Appeals are so clearly correct that the petition raises no substantial legal question to be considered by this Court.

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[3] Pp. 16536, 16537, 17241, Congressional Record, 81st Congress, 2nd Session.

A similar amendment to the union shop bill was urged by the general counsel for The International Association of Railway Employees, a Negro labor organization, when he appeared before the House Committee on Interstate and Foreign Commerce during hearings on H. R. [illegible]. See p. 294, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, Eighty-First Congress, Second Session.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari does not fulfill those conditions specified in Rule 19 of this Court which justify the granting of a writ.

Respectfully submitted,

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APPENDIX.

OPINION OF DISTRICT COURT IN WASHINGTON, ET AL. v. CENTRAL OF GEORGIA RAILWAY, ET AL.

Civil Action No. 711.

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA,
MACON DIVISION.

CURTIS H. WASHINGTON, *et al.*,

Plaintiffs,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *et al.*,

Defendants.

BOOTLE, *District Judge*:

The above action was instituted in this Court on December 12th, 1949, by a number of Negro firemen on the Central of Georgia Railway Company to strike down racial discrimination then practiced under the Southeastern Carriers' Conference Agreement of February 18th, 1941, limiting Negro firemen, euphemistically referred to therein as non-promotable firemen, to 50% in each class of service. The action accomplished its purpose in that on March 25th, 1952, Judge A. B. Conger signed a consent decree permanently enjoining all defendants, including the Central and the Brotherhood of Locomotive Firemen and Enginemen:

> "(a) from enforcing the Southeastern Carriers' Conference Agreement of February 18, 1941, or any other written or oral agreements, or carrying on any practices under such agreements, insofar as said agreements or practices discriminate, on the ground

of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on Diesel locomotives, or (b) from denying to plaintiffs or other members of their class their respective rights to assignments as firemen on steam locomotives or as helpers on diesel locomotives based upon seniority and qualifications because they are Negroes or because they have not been permitted or required to take or pass examinations to qualify as engineers. * * *"

On December 18, 1957, Al Marshall, Major Simpson, Will Covington, Jim Mullins and Marion Vincent, five Negro firemen employed by the Central, filed their motion to intervene in said case and to be permitted to file their petition against the Central and the Brotherhood for a rule to show cause why they should not be held in civil contempt for certain alleged violations of said injunction. The intervention was allowed, the petition filed and rule to show cause issued.

The interveners have made the following showing. Their employment by Central antedates the injunction and they are entitled to the benefits thereof. The Brotherhood is their exclusive bargaining representative with the Central under the Railway Labor Act. They are excluded from membership in the Brotherhood because of their color. Due to the long standing rule applicable on the Central that engineers must have experience as firemen and that Negroes may not become engineers, Negro firemen have become the senior firemen having the right to choice runs and all other rights accompanying high seniority. One of the choice runs on the Central is the freight run from Columbus, Georgia to Birmingham, Alabama on the Columbus Division. For 20 years or more prior to March, 1957, this run was worked for the most part by five Negro firemen with top seniority who shared its mileage.

As of the time of the filing of this intervention these runs were held by the five interveners and their mileage averaged about 3760 miles in a 30 day month and 3610 miles in a 31 day month, the smaller mileage in the longer month being due to the men's being "held off" so as not to exceed the maximum of 3800 miles per month, as prescribed in the Schedule of Wages, Rules and Regulations hereinafter mentioned.

On or about March 1, 1957, pursuant to an agreement between the Brotherhood and the Central a "swing man" was added to this regular assigned run. He takes the fifth run of each man four times a month causing each of the five men to lose mileage and pay. Since the swing man has been added each of these five regular assigned jobs lose 628 miles per month representing a loss of pay of something like $100.00 per month for each man. Intervener Marshall testified that it reduced his monthly pay from approximately $650.00 to approximately $580.00.

Upon the basic facts above found the parties rest radically diverse contentions. Interveners say that in adding this swing man and in thus taking mileage and pay from them, the Brotherhood and the Central have flagrantly violated the injunctive decree of this Court in that they have thus been "enforcing * * * written or oral agreements [and] carrying on * * * practices [which] discriminate, on the ground of their race or color, against Negro firemen in their employment or occupation as firemen on steam locomotives or as helpers on diesel locomotives * * *."

The Central and the Brotherhood, on the other hand, emphatically deny both the alleged intent to discriminate and the alleged fact of discrimination.

Interveners' counsel succinctly outlined their contentions as follows: "We do not contend * * * that these outstanding Federal decrees [similar decrees were issued in

other Courts] prevent any reduction in the pay and privileges of Negro firemen of any kind. Any reduction which is made equally across the board, affecting all, certainly is not a discrimination against Negro firemen. We do not claim that the injunctions have insulated these men in a position where they can come to a federal court and resist any type of reduction in their pay or mileage. That is certainly not what was intended, but we say that discriminatory reduction where we can show that the Negroes have been selected for the application of an adverse rule such as this one and that whites are not similarly subjected, that, we say, of course, is the exact discrimination which the very terms of the consent decree prohibit. * * * I have thought about just what discrimination means, and what it takes to prove it, and I think what I mean in this case by discrimination is the selective—the racially selective application of reduction in job rights. That is what I mean, and I think that is what we intend to prove; the curtailments in the privileges and payments of jobs effected against Negroes but not against whites basically, and I think that is the kind of discrimination covered and the kind we will show has been effected in this case."

Interveners claim the existence of certain matters "in aggravation of this discriminatory reduction in their mileage," namely, that (1) they were "frozen" in these reduced mileage jobs and denied their contractual right to shift to another job; (2) this inroad upon their seniority privileges and pay and mileage was totally racially selective in the sense that no comparable reduction of the pay of white firemen was made on the Columbus division or other divisions of the Central; (3) their pay loss necessarily goes to white firemen and (4) a system of discrimination has been built into the railroad industry in that only white firemen were promotable to jobs as engineers; that thus an

engineer, always a white man, may have seniority as a fireman, engineer, hostler and hostler helper, whereas a Negro fireman has seniority only as a fireman and that consequently a demoted engineer who is "back firing," in competition with interveners, has the possibility of supplementing his pay as a fireman with pay earned in another capacity, whereas such possibility is not open to interveners.

Counsel for the Brotherhood, after denying discrimination and discriminatory intent, deny also that interveners have a right to run a greater mileage per month than other firemen generally run and deny that adjusting their mileage to bring them in line with mileage run by other firemen constituted hostile discrimination in any legal sense of the word. The Brotherhood says further that this swing man was added in keeping with the Brotherhood's policy nationally and locally to spread the work among all employees for whom it acts as bargaining agent, and that this policy has been, and is being, applied discriminately not only to the Columbus division but to all divisions and districts of the Central and not only to Negro firemen but to white firemen as well.

The Central's position is that prior to March 1, 1957, Article 26, Section 2(a) and (f) of the Schedule of Wages, Rules and Regulations governing locomotive firemen read as follows:

"SENIORITY, MILEAGE AND PROMOTION.

"Section 2. REDUCTION OF FIREMEN'S WORKING LISTS: When from any cause it becomes necessary to reduce the number of firemen on the firemen's working lists on any seniority districts, the following rules will apply:

"(a) No reductions will be made so long as those in assigned or extra passenger service are averaging

the equivalent of 4,000 miles per month; in pooled, chain-gang freight or any other assigned service, paying freight rates are averaging the equivalent of 3,200 miles per month; on the road extra lists are averaging the equivalent of 3,200 miles per month; or those on the yard extra lists are averaging the equivalent of 32 days per month.

* * * * *

"(f) In the regulation of assigned or extra passenger service, a sufficient number of men will be assigned to keep the mileage or equivalent thereof within the limitations of 4,000 and 4,800 miles per month; in assigned, pooled, chain-gang or any other service paying freight rates, a sufficient number of firemen will be assigned to keep the mileage or the equivalent thereof within the limitations of 3,200 and 3,800 miles per month. Neither the maximum nor the minimum is guaranteed.";

that due in part to dieselization, there has been a reduction in need for firemen and engineers, and by reason of this reduced need and in an effort to distribute the available work among as many as possible of the employees, both Negro and white, the Brotherhood petitioned the Central in accordance with the Railway Labor Act for a revision of the Article and Section above quoted so as to reduce from a minimum of 3,200 to a minimum of 3,000 the number of miles a fireman, be he white or Negro, in freight or any other assigned service paying freight rates would be entitled to make per month before there could be a reduction by the Central in the "firemen's working lists," that is a roster from which men for trains are taken according to seniority and entirely without regard to race; the Central, in good faith, consented to said request and, accordingly, Article 26, Section 2(a) and (f) was re-written, changing in Section 2(a) the figure

4,000 to 3,800, the figure 3,200 to 3,000 and in the last line thereof "32 days" to "26 days," and changing in Section 2(f) the figure 4,000 to 3,800 and the figure 3,200 to 3,000, this agreement having been entered into on February 21, 1957, to become effective March 1, 1957; under the amended agreement it was possible to add a swing man on the Columbus to Birmingham freight run without violating the new minimum of 3,000 miles per month; the addition of this swing man was also provided for in Section 2(h) of Article 26, which reads:

> "(h) To keep within the mileage regulations set forth in this section, additional crews may be added or swing men used to relieve the regular men on specified days. If regulation cannot be made as provided herein, men will be required to lay off so that the equivalent of 4,800 miles in passenger service, or 3,800 miles in other assigned service, will not be exceeded.";

the sixth, or swing man's, job was bulletined in accordance with the contract between the Central and the Brotherhood and has been filled strictly according to seniority and entirely without regard to an employee's race; and insofar as the Central is concerned the amended Article 26, Section 2(a) and (f) has been applied uniformly to all firemen, both white and Negro, wholly without discrimination against any employee or group of employees.

At the conclusion of the evidence, the Central moved to be dismissed as a party defendant upon the ground that there was no evidence tending to show any discriminatory acts by it. Interveners expressly consented that said motion be granted while the Brotherhood took no position with regard to said motion. Thereupon, the Court entered an order exonerating the Central with regard to the contempt charges, but retaining it as a party

defendant so that it would be subject to such further order or orders as may be entered in the case.

Under the law, the burden is on the moving party to show the facts necessary to establish contempt. This burden must be carried by clear and convincing evidence. While proof beyond a reasonable doubt is not required, the authorities sometimes say that more than preponderance of proof is required. "Whatever qualifying adjective may be used in the various opinions, they are unanimous that a heavy burden of proof rests upon the party urging contempt." *Kansas City Power & Light Co. v. National L. R. Board,* 137 F. 2d 77, 79 (8th Cir. 1943); 15 *Cyc. Fed. Pro.* Sec. 87.87 (3d ed. 1953). Added to the burden above outlined which is applicable to all contempt cases, interveners have the burden here of showing not only discrimination, but discrimination "on the ground of their race or color," such being the terms of the decree.

After a careful consideration of all of the interveners' contentions and all evidence adduced, this Court is convinced that no discrimination, and hence no contempt, has been shown. I find that the Brotherhood, in good faith both nationally and locally, adopted a policy of distributing the work among firemen represented by it as bargaining agent. This policy has been, and is being, applied not only on the Central but on other railroads. It is not a surprising policy in view of the reduced need for firemen. One diesel engine pulls longer trains than the old steam locomotive engine and one fireman, or helper on diesel locomotives as he is now called, with one engineer operates multiple diesel units. On the Central, this policy has been, and is being, applied not only to interveners but to any and all firemen to whom mileage conditions render it applicable, and it is applied not only on the Columbus division, but on all divisions and dis-

tricts where circumstances permit. The Central has three divisions, Savannah, Macon and Columbus, the Savannah division having only one district, namely, the Savannah district; the Macon Division having two districts, namely, the Atlanta and the Southwestern and the Columbus division having two districts, namely, the Columbus district and the Cedartown district. No racial discrimination was involved in adding this swing man. This additional job was not created for a white man. Interveners allege in Exhibit B, the affidavit of Al Marshall attached to their petition, that the swing job was held by R. B. Gable, a white man, who, although junior in seniority to Negro firemen from whom he takes mileage, is permitted to make mileage and pay equal to and greater than the mileage and pay of the senior Negro firemen from whom he takes his mileage. I find, however, that this job was, in accordance with the applicable agreement between the Central and the Brotherhood, regularly bulletined for the first five days in March, 1957 and was available to the highest seniority bidder who turned out to be Will Covington, one of the five interveners. He bid this job in on March 6, 1957, and held the run until March 31, 1957. The white man, Gable, may have held the run from the extra board during the first five days of March while it was being bulletined. Later, he was swing man from April 18 to May 31, August 29 to September 8, and December 1 to December 17. It is true, therefore, that this swing job, like all other firing jobs on Central, was open to the highest bidder regardless of race or color and there is considerable turnover in some of these jobs according to the bidding.

The use of a swing man on the Central is not new. As above shown, swing men are provided for by Section 2(h) of Article 26, of the Schedule of Wages, Rules and

Regulations. Mr. W. M. Ector, the Central's superintendent on the Columbus division, found a swing man in passenger train service when he came to Columbus in 1953. Three passenger trains were being operated to Birmingham and the five firemen assigned to these trains were four colored and one white. Four passenger trains were being operated to Atlanta and the three firemen assigned to them were two colored and one white. In March, 1953, a white man was put on these runs as a swing man, swinging on both the Birmingham run and the Atlanta run and taking mileage from both Negro and white firemen and making a little more than the regular firemen. There is a swing man on the Savannah division now having been there approximately five years, although no swing men have been added in that division in the last three years. William E. Mitchell, Vice-President of the Brotherhood, testified that swing men are used throughout the country as a general practice and related an instance in 1953 on the Atlantic Coast Line in Georgia where white firemen, members of the Brotherhood, were challenging its authority to add a man to an assigned run thereby bringing the mileage to these men below the minimum prescribed by the rules. The man was added, the mileage reduced and this action was affirmed through all the appellate procedure of the Brotherhood.

The fact that the minimum monthly mileage was reduced from 3,200 to 3,000 has made it possible to keep men in pools who would otherwise have been removed, thus saving jobs, and has made it possible to add men to pools and on extra boards, thus creating more jobs. Five specific instances were disclosed. (1) During the first half of May, 1957, in the Southwestern district of the Macon division there were in a freight service pool three white and two colored firemen making a total 15 day mileage of

9,366 or 1,873 miles per man. The reduced mileage agreement permitted the addition of a sixth man for the second half of the month when the total mileage was 10,286. The effect of adding the sixth man was to take away from each of the three white and two colored firemen 343 miles for the month. (2) For the first half of September, 1957 in the Southwestern district of the Macon division there were in pool freight service five white and one Negro firemen each making for said half month a mileage of 1500. Had it not been for the reduced mileage agreement a man would have been taken from the pool. During the second half of the month the six men made 1,488 miles each. If, during the second half there had been only five men in the pool the average for said half would have been 1,786 miles. Thus, but for the reduced mileage agreement, five of these men would have earned 298 miles more than they did. (3) On an extra board in the Atlanta district of the Macon division for the second half of April, 1957, because of the new rule and the addition of a sixth man five white firemen lost 373 miles per man. (4) On an extra board in the Columbus division Cedartown district because of the new rule three white firemen lost 773 miles each for the second half of August, 1957. (5) On March 16, 1957, a man was added to the extra board on the Savannah division, this being made possible by the reduced mileage agreement.

Coming now to the four instances claimed as aggravation of the alleged discrimination, while it might suffice to say that there can be no aggravation of discrimination in the absence of discrimination, an analysis of these claims is to be preferred.

Intervenors' claim that they were frozen in these reduced mileage jobs and thereby denied their contractual right to shift to others would be serious, if substantiated.

Certainly, if these men were, because of their race, denied the right to assert their firing seniority with respect to any job open to white men because of firing seniority, they would be entitled to quick and certain relief. Notwithstanding the fact that this claim was not mentioned by interveners in their pleadings, the Court, nevertheless, ruled at the trial that they were entitled to show the overall picture of what was being done, the consequences of it, the background, the setting and how it all operated. This particular claim is based upon interveners' interpretation of Section 6(d) of the Schedule of Wages, Rules and Regulations and particularly upon that portion herein italicized, which section reads as follows:

> "(d) Changes of time tables, of schedules, and of rates of pay do not constitute changes in working conditions that will warrant runs to be bulletined. *Runs will be bulletined when miles are added to or taken from the run,* or where the terminal or lay-over of such runs are changed. This is to apply to all men in engine service, except on local freight schedules which are changed three hours or more." (Emphasis supplied.)

Admittedly, interveners' runs as distinguished from the new swing run were not bulletined and interveners point out, therefore, that they were not permitted to roll a junior fireman off his job, but would have to remain on their old jobs until some other job was advertised at which time concededly they could bid. At most, therefore, this is a claim of a temporary freeze. Apparently, this claim is not taken or asserted too seriously by interveners. Not only was it not mentioned in their pleadings, but their counsel, in outlining their contentions to the Court, said with reference to this claim: "And, as I said before, this is not material to the case but aggravates what happened to these

men, in that it reduced their mileage and actually froze them into that reduced mileage. But it is not that against which we seek relief, but against the reduction in mileage." While intervener Marshall testified that if his job had been bulletined there were two other jobs he could have got, I find that one of these jobs was bulletined subsequent to March, 1957 and that he did not take it then because he preferred to stay where he was. When he was asked whether, if the other one had been bulletined he would have changed his mind about it as he did about the one which was bulletined, he stated: "Maybe I could have; I don't know." This particular contention presents, at most, a question of interpretation of Section 6(d). Interveners claim that under this section their jobs should have been bulletined. The Brotherhood contends, on the other hand, that when a swing man is added only the swing man's job should be bulletined. The Brotherhood's position is that the language of the rule "runs will be bulletined when miles are added to or taken from the run" relates to the run itself and not to the man, and that if the run is lessened, for instance where the terminal is changed, the run will be bulletined, whereas, if the runs remain the same they are not to be bulletined even though a swing man is added thereby causing the firemen to earn less from their runs. The General Chairman of the General Committee of the Brotherhood, who has held that position since June 1, 1953 and who has been employed by the Central for approximately 15 years, testified that such has been the interpretation of this section ever since he has known about it. There is no contention that this section has ever been applied in this type situation other than in the same manner it was applied here. Therefore, no discriminatory application of this section has been shown.

The claim that no comparable reduction in the pay of white firemen was made has been fully covered.

Interveners' claims by way of aggravation that their pay loss necessarily goes to white firemen and that a Negro fireman cannot supplement his earnings while a white fireman holding seniority in other lines of work may do so both stem from the railroad and Brotherhood discrimination against Negro firemen by denying to them the right to be promoted to engineers' jobs. Interveners' counsel, himself, answered these contentions in his opening statement when, in reply to the Court's inquiry: "That is because one is promotable and one is not?" said:

> "That aggravation results from that fact, that's right. But we, of course, do not seek any relief with respect to that. It is one that has been built in by virtue of the discrimination practiced for 50 years and there is no longer any solution to that, so we do not seek any redress against it. We merely point it out to illustrate that this new reduction in the mileage has caused a more aggravated situation to arise."

Of course, it is only partially true that interveners' pay loss goes to white firemen. Immediately, their pay loss, as has been demonstrated, goes to the swing man, who most generally is a Negro because of the Negroes' high seniority as firemen. It may go, more or less temporarily, to a demoted engineer who claims a firing assignment until he can return to duty as an engineer. To the extent that the addition of the swing man creates one more firing job in the overall firing picture for the benefit of a junior fireman way down on the list, this pay loss does benefit a white junior fireman. This is necessarily so because under the old 50% rule, stricken down by the injunction in this case, over a long period only white firemen were added as employees and so many were added

that during the last fifteen years no new firemen, white or colored, have been employed in the Columbus division. The identity of firemen at the bottom of the seniority list, therefore, results from discrimination which antedated the injunction and which the injunction did not undertake to correct except for the future. With respect to these contentions, therefore, the respondents cannot be adjudged in contempt for failing to do more than the injunction required.

In the case of *Oliphant v. Brotherhood of Locomotive Fire. & Eng.*, 156 F. Supp. 89, 90 (N. D. Ohio, 1957), the main object of which is to compel the Brotherhood to admit Negro firemen to membership, certain acts of discrimination were alleged including the addition of this swing man involved in this case, and Al Marshall, one of the interveners here, testified there covering this common feature or aspect of the two cases. In the opinion in that case, Chief Judge Jones wrote:

> "It is the plaintiffs' position that the Brotherhood has never represented the Negro workers on equal terms with the white workers, that the United States Supreme Court in Steele v. Louisville and Nashville R. R., 323 U. S. 192, 65 S. Ct. 226, 89 L. Ed. 173, recognized at least one instance of this unequal treatment and ordered the Brotherhood to cease this discrimination, and that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of

discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the Negroes."

Collective bargaining contracts and arrangements worked out in good faith between the statutory representative of a craft and the employer are not vitiated merely because they "may have unfavorable effects on some of the members of the craft represented." *Steele v. Louisville and Nashville R.R. Co.*, 323 U. S. 192, 203, 89 L. Ed. 173, 183 (1944). See also *Ford Motor Co. v. Huffman*, 345 U. S. 330, 97 L. Ed. 1048; *Aeronautical Industrial Dist. Lodge 727 v. Campbell*, 337 U. S. 521, 93 L. Ed. 1513.

Let counsel for respondents prepare a judgment in accordance herewith and submit the same to counsel for interveners who shall have five days for suggestions as to form.

This 27th day of June, 1958.

/s/ W. A. Bootle,
United States District Judge.

(Emphasis ours.)